# Key institutional issues and possible scenarios for the review of the EC electronic communications framework

Larouche, P.; de Visser, M.C.B.F.

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## KEY INSTITUTIONAL ISSUES AND POSSIBLE SCENARIOS FOR THE REVIEW OF THE EC ELECTRONIC COMMUNICATIONS FRAMEWORK

By

Pierre Larouche and Maartje de Visser

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# KEY INSTITUTIONAL ISSUES AND POSSIBLE SCENARIOS FOR THE REVIEW OF THE EC ELECTRONIC COMMUNICATIONS FRAMEWORK

***Pierre Larouche and Maartje de Visser***

## Introduction

Perhaps appropriately for such a dynamic sector as telecommunications, the institutional setup in EC electronic communications law has not remained static. Since the onset of this body of law in the 1990s, we have also witnessed various actors taking the front-line position. In the upcoming 2006 Review, the institutional setup, and in particular the institutional division of competences that this setup entails, will again be a major topic for discussion.

The aim of this paper is to survey some of the institutional issues which are likely to come up for discussion in the 2006 Review. Some of them concern fundamental elements of the existing institutional design, others are more practical. We will first deal with some issues that go to substance (I) before going through more procedural matters (II). For each of these issues, we consider the various policy scenarios available and their implications.

## I. SUBSTANTIVE ISSUES

### A. The failure to achieve deregulation

There is a clear tension between on the one hand the deregulatory ambitions of the electronic communications framework (which was meant ultimately to give way to general competition law) and on the other hand the persistence – even increase – of regulation in practice. Not only does this create confusion amongst market players, and arguably NRAs; on a wider scale, it can point to a failure of the electronic communications framework to achieve one of its core objectives: less regulation. In addressing this issue, it must be assessed whether this tension is inherent in the current design of electronic communications regulation, or whether it is exogenously imposed on an institutional framework otherwise capable of delivering on the regulatory objectives. In our opinion, there is a bit of both: the design of the regulatory framework does not necessarily give the proper incentives to NRAs, whilst the Commission Recommendation on relevant markets – the first "command" which was fed in the system – probably exacerbated the problem with its long list of markets (a point taken up further below under C.)

In order to limit regulatory expansion, *the proportionality test* could be applied more strictly at all stages, i.e. when drawing up the Commission recommendation on relevant markets as well as when NRAs take enforcement action, including the remedies stage. While the current framework indeed contains several references to the principle of proportionality, it would be helpful to include in Article 4 FD that national courts are expressly called upon to assess NRA actions for compliance with this principle.

More fundamentally, *the 'incentive-problem'* itself could be tackled. NRAs have very little incentive or reason to reduce regulation, since this would imply that they and the regulatory framework they are applying have achieved their purpose. Logically, the NRAs should then dissolve themselves which, however noble a gesture, appears unlikely. NRAs – and the Commission to some extent as well[1] – therefore have an incentive to find markets which are in need of regulation. Here a trade-off could be made between the substantive and procedural aspects of the regulatory framework. Since it is assumed that in substance regulation will become superfluous once competition sufficiently settles in, there is an incentive for NRAs to use the procedures at their disposal to show that regulation is still needed. If on the other hand the regulatory framework in substance assumed that some minimal amount of regulation is likely to remain in the long-run,[2] NRAs could feel more secure in using the procedures at their disposal to roll back regulation towards that minimum. More radically, if ever a European Telecommunications Authority (ETA) were to take over from the NRAs, it would become easier for one agency to plan its own demise than for 25.

## B. **Objectives of the regulatory framework and accountability of NRAs**.

Here we wish to highlight two shortcomings of the current regime.

Firstly, Article 8 FD lists the various objectives to be pursued by the NRAs in applying and enforcing EC electronic communications regulation. There is however ample opportunity for internal conflict amongst them, especially given the absence of any clear hierarchy. How, and to whom, should NRAs be accountable for choosing one objective over another when faced with a conflict (or, indeed, even in the absence of a conflict)?

Secondly, the electronic communications framework can be called agnostic, in the sense that it does not have a clear end-policy goal listed. Contrast this agnosticism with the 2000 Lisbon Strategy, which aims to make Europe 'the most competitive and dynamic knowledge-based economy in the world by 2010'. Normally, one would expect to see such a statement of intent reflected or reproduced in the new framework, as opposed to bland objectives such as a "competitive market", "the internal market" and "interest of citizens". In this respect, it is recalled that, historically, the Commission singled out telecommunications as an area for EC involvement because the EC was running dangerously behind the United States and Japan. Currently, there is a danger that Europe may find itself in that predicament again, with dire consequences given the increased significance of the enlarged telecommunications sector for the whole economy. Under the current framework, it would be up to the NRAs to heed the Lisbon Strategy and avoid Europe falling behind. How can it be ensured that they indeed do so, i.e. how can the NRAs be made accountable for the – failure to – achieve the Lisbon goals?

[1] The decisions taken by NRAs under the electronic communications framework, together with those taken by the Commission under Article 7 FD, provide an interesting field in which to hone certain arguments and give them enough precedential value that they could be taken over into general competition law (especially on pricing or access issues).

[2] This prediction is not difficult to make: it is likely that network effects and bottlenecks will always distinguish electronic communications from the average industrial sector, thereby justifying regulatory attention, however limited. In any event, scarce resources and universal service are likely to remain as regulatory themes even if access-type issues would vanish.

This is one of the thorniest issues – if not the thorniest one – to be addressed in the 2006 Review. A single clear-cut answer does not seem possible. Rather, several interlinking changes will be necessary in order to achieve the desired result.

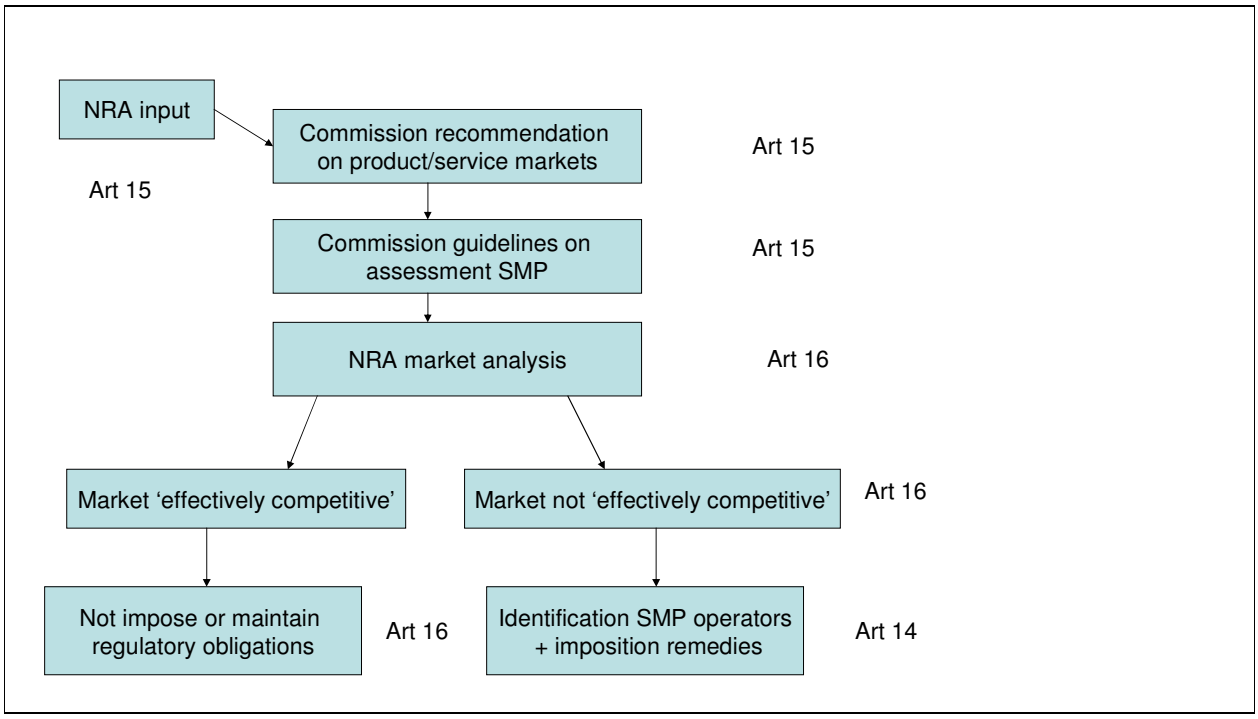
As a first step, the objectives listed in Article 8 FD must be better sorted out. Currently, these read more like a catalogue than a coherent statement. More worrisome is the inherent danger that these goals conflict with each other. Of course, it can be submitted that since a wide array of policy choices is to be achieved, this result is inevitable, or even in accordance with the principle of subsidiarity, under which it would be up to each NRA to opt for the best compromise between these goals in the light of its respective situation. NRAs should then be answerable to two bodies for their choices: firstly to the Commission; and secondly to national courts. In the former case, when carrying out the assessment of draft measures pursuant to Article 7 FD, the Commission could comment upon, or override, the choice made by the NRA as between the various objectives. In the latter case, Article 4 FD could be amended to expressly give national courts the competence to scrutinize, and if need be, sanction the NRA's choice.

This option, however, seems problematic for two reasons. First of all, a heightened accountability to the Commission, and especially to the national courts, could potentially undermine the wide, discretionary powers that NRAs were accorded by the 2003 Framework precisely in response to a perceived undue interference by national courts.[3] Secondly, and more seriously, this option does not address the problematic relationship between Article 8 FD and the Lisbon goals. A better approach is to reflect the Lisbon goals in the policy objectives that should be the ultimate guide for the NRAs in their decision-making. This is likely to require re-phrasing, reducing and restructuring of the current objectives. There should be a single core policy objective, or regulatory message translating the Lisbon objectives to the telecom sector, for instance that priority should be given to innovation or to the rapid introduction of new technologies. The current objectives of promoting competition, developing the internal market and promoting the interests of EU citizens can, if desired, then be listed as sub-objectives. Having a single overarching objective removes the existing potential for conflict or diverging policy approaches.

## C. The SMP procedure at Articles 14, 15 and 16 FD

The procedure found in Articles 14 to 16 FD can be depicted as follows:

[3] See the issue C, under II (the situation and position of national courts) below, at p 12 et seq.




Two points worthy of reflection emerge.

1. *The relationship between SMP and effective competition*

Firstly, the Commission assumes, in its Guidelines on the assessment of SMP,[4] that a finding of SMP automatically and necessarily entails that a market under scrutiny lacks effective competition.[5] Conversely, if a market is deemed to be effectively competitive, a finding of SMP does not seem possible. In other words, effective competition and the absence of SMP are equated with each other. NRAs are deprived from any discretion in this respect.

Yet it is conceivable that despite the presence of SMP the relevant market is nevertheless effectively competitive. For instance, the theory of contestable markets would tend to show that markets with a dominant player can still be operating effectively if the threat of entry is credible.[6] Conversely (but perhaps less likely), despite a finding of absence SMP it is possible that there is a lack of effective competition in the relevant market. For example, in the absence of single-firm

[4] Even though the text of Article 16 FD does not make such a link between SMP and effective competition.
[5] Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services [2002] C165/03, points 5 and especially 19.
[6] Of course, there is a definitional issue here as well. On a rigorous analysis of market power, the threat of entry (i.e. potential competition), in the absence of significant barriers to entry, should lead to a finding that there is no (or only limited) market power. At the same time, it is known that, under EC competition law and sector-specific regulation, the analysis of market power (whether carried out under the guise of dominance or SMP) tends to focus on certain indicators (first and foremost market share) and therefore stops short of a full-fledged analysis. Note that under the electronic communications framework, the markets to be analyzed are presumably characterized by high and persistent barriers to entry, if they were selected in the first place.

dominance, a market might still not see vigorous competition because of an oligopolistic structure or of limited competitive pressure due to a small number of players[7]: the ability of "collective SMP" to catch that situation is limited, given the restrictive conditions for that doctrine to apply. In the former situation, regulation would be inappropriate; whereas in the latter situation relying merely on general competition law might not deliver the desired outcomes. In any event, decoupling SMP from effective competition might allow room for a more nuanced economic analysis to come to bear.
Adopting a wider perspective, it should be remembered that the real objective to be achieved is not effective competition, but consumer welfare. It is crucial to avoid that the acceptance of consumer welfare in competition law pure – as opposed to protecting competitors – should now resurface in the telecommunications law regime, which is based on competition law.

This option *could* lead to increased discretion for NRAs – *could* because it depends on how the Comission's veto power under Article 7 FD evolves. Also, a consideration to bear in mind when pursing this option is whether it could not ultimately lead to an increase, rather than a decrease, in regulation: NRAs have in principle very little incentive to limit their own competences, and an increase in competences – through more discretion – therefore can result in more regulation. This point links back to issue A, under I (the failure to achieve deregulation).

2. *The number of markets to be analysed*

Secondly, the market analysis procedure is mandatory for each and every market identified in the Commission recommendation. Currently, 18 such markets are listed, which is a fairly high number.

We will not engage in a discussion of deciding how this reduction should take place or which markets should be removed from the current list. Rather, it is noted that a reduction in the number of markets to be analysed has the following repercussions. NRAs will see their tasks and responsibilities reduced.[8] The Commission as well as the NRAs will experience a reduction in workload – mainly because the Article 7 procedure will become more manageable or less burdensome. The resources currently used to carry out the market analysis and SMP analysis can then be deployed elsewhere. Finally, a reduction in the number of markets should also lead to a reduction of regulation in general, also linking back to issue A, under I (the failure to achieve deregulation).

3. *Judicial review of the Commission recommendation*

Thirdly, the long list of markets in the Commission recommendation cannot be challenged so easily. The recommendation seems immune from scrutiny under proportionality or for any other ground: recommendations are expressly excluded in Article 230 EC from challenge before the

[7] What is now encompassed in merger control under the heading "non-coordinated effects" without single-firm dominance: see the Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] C31/03, point 24 et seq.
[8] Of course, fewer markets in the Commission recommendation does not imply that markets that are not or no longer included cannot be regulated by NRAs. They can, but a decision to do so would be subject to a potential Commission veto. It can be assumed that NRAs are not very likely to engage in regulation of non-listed markets. This would exert a beneficial impact on reducing the amount of regulation.

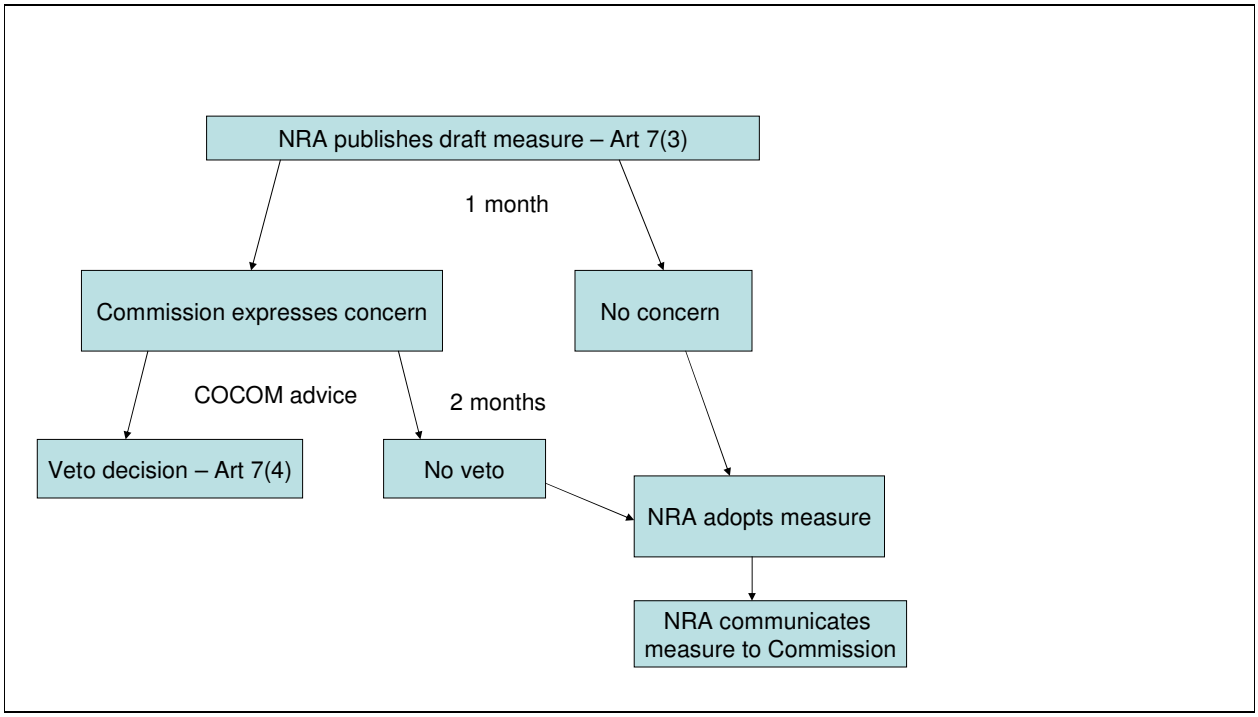
ECJ.[9] As the Commission recommendation is in fact the trigger for the entire market definition and analysis procedure, judicial review however seems particularly apposite. While this could be achieved by turning the recommendation into a binding instrument, this solution ignores, even contradicts, the hierarchy of sources found in Article 249 EC. In any event, the case-law of the ECJ on the admissibility of challenge from private parties to Community legislation under Article 230 EC would still present a formidable obstacle to judicial review.[10]

## II. PROCEDURAL ISSUES

### A. The review and veto procedure of Article 7 FD[11]

#### 1. *The issues*

The procedure as currently contained in Article 7(3) and ff. FD operates as follows:




Three issues for discussion emerge here. Firstly, the need for and/or appropriateness of the Commission's veto power can be questioned. With that power, the Commission is thus placed hierarchically above the NRAs – something which might be difficult to reconcile with the existence of the European Regulators Group (ERG), which is supposed to function in a spirit of

[9] It is interesting to note that the original proposal for the FD provided for a decision on relevant markets and not a recommendation.
[10] Case 25/62 *Plaumann and Co v Commission* [1963] ECR 95; reaffirmed in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR II-6677.
[11] Directive 2002/21 of 7 March 2002 (Framework Directive) [2002] OJ L 108/33 (hereinafter FD).

mutual cooperation and equality. Secondly, it can be queried – as indeed is happening – whether the Article 7 procedure as a whole is too cumbersome. As illustrated above, it consists of several stages, all with rather stringent time-limits. Crucially, the applicability of the Article 7 procedure is the rule rather than the exception: most NRA draft measures fall under the Article 7(3) and ff. procedure. This entails a heavy workload, not only for the NRAs (which are in addition faced with the obligation to consult with market players as well, pursuant to Article 6 FD), but also for the Commission, which is called upon to analyse hundreds of draft measures.[12] The third issue concerns the possibilities for judicial review of documents adopted by the Commission under Article 7.

2. *Options as regards the Commission's veto power*

We will run through all options for now.

a. Status quo

According to Article 7 of Directive 2002/21, the Commission's veto power is meant to ensure that NRA decisions do not "create a barrier to the single market" and are "compatib[le] with Community law and in particular the objectives referred to in Article 8 [FD]". The need for such a mechanism is not just theoretical: the Commission thus far has already been called upon to issue five veto decisions, and exercise informal pressure to ensure the withdrawal of eight further draft measures, which otherwise would also have been subject to a veto decision. This can be contrasted with the situation under EC competition law, where a comparable power exists – the Commission can pursuant to Article 11(6) of Regulation 1/2003 take over a case from the NCA and thereby deprive it from jurisdiction to deal with the case further – which the Commission thus far has not needed. The veto power thus seems to correspond to a real need, at least in the eyes of the Commission. Further, whereas a veto decision is of course intrusive, it must be recognised that it ultimately does not affect the decision-making power of the NRA to issue a final decision in the individual case. By contrast, in competition law, once the Commission decides to invoke its Article 11(6) competence, the jurisdiction of the NCA is terminated once and for all.

Accordingly, one could claim that the current system appears to remain necessary and to be correctly balanced, and that it should be kept intact until further experience dictates otherwise.

b. Abolish the veto power altogether.

The existence of a veto power puts the Commission in a hierarchically superior, controlling position vis-à-vis the NRAs. This is both undesirable and unnecessary. It is undesirable, because the Commission and the NRAs are meant to follow the same regulatory objectives (as set out in Article 8 FD) and should therefore be able to coordinate their activities without the need for a "hard" veto power on the part of the Commission. The existence – and use of – a veto power has

[12] A quick calculation shows that, at a bare minimum, 25 NRAs times at least 18 markets will result in 450 decisions, without taking into account the fact that many NRAs further refine the markets – either product-wise or geographically.

the effect of pitting the Commission and the NRAs against in each other.[13] The existence of Article 7(4) FD is also unnecessary, because there are other mechanisms already in existence that can be relied upon to achieve the same results. The Commission can, and also does, use informal pressure. Article 7(3) FD provides for compulsory consultation of the Commission, which provides the occasion for an exchange of views.[14] In terms of formal enforcement instruments, the Commission can rely on either infringement proceedings under Article 226 EC against the Member State whose NRA is called to order, or competition law, notably Articles 81 and 82 EC, which are often applicable to major regulatory problems (or on both instruments simultaneously).

c. Tightening the conditions under which the veto power is exercised

The veto power can be curtailed by tightening the conditions under which the veto power can be invoked. The criteria of Article 7(4) FD, as set out above (barrier to the single market or incompatibility with Community law, in particular Article 8 FD) appear rather stringent. Yet in practice the Commission does not appear to pay more than cursory attention to them. A case in point is the veto decision on the RegTP's proposal not to designate the Alternative Network Operators (ANOs) as having SMP on the market for call termination on individual fixed networks.[15] The reasoning of the Commission on why the RegTP's proposal would affect the internal market or be incompatible with Community law is very cursory.[16] It is well known that the RegTP in its proposal followed an approach which was not shared by the Commission and by the other NRAs who had already ruled on the issue. One would have expected the Commission to answer the question of whether, why and how the presence of two different approaches amongst the NRAs would affect the internal market or be incompatible with Community law. After all, the electronic communications framework leaves matters in the hands of the NRAs precisely to ensure that decisions are better attuned to national circumstances and that NRAs can explore different approaches. The mere fact that the Commission disagrees with an NRA on substance should not be enough to warrant a veto.[17] It might be useful to specify that Article 7(4) FD does

[13] Also because the veto power can be used to considerably curtail the discretion of NRAs. One of the criteria for the exercise of Article 7(4) FD is the existence of 'serious doubts as to [its] compatibility with Community law and in particular the objectives referred to in Article 8'. As noted, these objectives may internally conflict. Thus, if the NRA has chosen one objective over another, the Commission appears to be able to use Article 7(4) to veto any such decision where it would have preferred another ranking.

[14] This occurs in the two Article 7 Task Forces, set up by respectively DG INFSO and DG COMP. The Task Forces have as main objectives *inter alia* to provide guidance to NRAs on legal or other aspects of the Commission's assessment of Article 7 notifications; and to indicate to the NRAs the likely attitude of the Task Forces on substantive issues, and exchange views on any other issue likely to be related to a notification, see the document prepared by the heads of the Task Forces at http://europa.eu.int/information_society/topics/telecoms/news/documents/workshop_electronic_comm_cons_mech/6 (consulted 22 November).

[15] Commission decision of 17 May 2005, Case DE/2005/0144, available at http://forum.europa.eu.int/Public/irc/infso/ecctf/library?l=/commissionsdecisions&vm=detailed&sb=Title (consulted on 22 November 2005).

[16] Ibid., para. 17 to 19.

[17] See for instance the case of call origination on mobile networks in Ireland, Decision of 20 January 2005, Case IRL/2004/0121, available at http://forum.europa.eu.int/Public/irc/infso/ecctf/library?l=/commissionsdecisions&vm=detailed&sb=Title (consulted on 22 November 2005), where the Commission accepted an approach from the Irish ComReg which differed from the other NRAs and with which it did not quite agree on substance. In that case, however, the Irish ComReg did extend the range of SMP designations further than the other NRAs, as opposed to the German case, where the RegTP had rather designated fewer firms than the others.

not give the Commission full review powers, but rather marginal review – i.e. a form of review where it is conceivable that the reviewing instance would not agree on substance with the decision under review – centred on the issues of effect on the internal market and compatibility with Community law. This approach also has the advantage of encouraging regulatory competition among the NRAs.

d. Transfer the veto power to another actor

This could be either the ERG or a newly set-up ETA. A transfer of the veto power to another actor may have the advantage of making its exercise less politically contentious, and thereby perhaps more acceptable to those on the receiving end of a veto decision. An issue that needs to be addressed if this option is pursued is whether the ERG or ETA can be bestowed with decision-making power, and consequently also, the issue of judicial review of veto decisions taken by these actors.

e. Extend the veto power to also cover remedies

Remedies were intentionally left outside of the veto power of the Commission in the electronic communications framework. It was thought that remedies – more than market definition or market assessment – were the part of the SMP framework where national differences could be best expressed. At the same time, there was also pressure for the NRAs to ensure some measure of consistency on remedies as well, resulting in the adoption of the ERG Common position on Remedies. In practice, most NRAs – because of national law or otherwise – notify a single draft measure encompassing market definition, SMP assessment and remedies, so that the Commission could somehow find a way to use its veto power against the draft measure if it considered that the remedies were not adequate. In the light thereof, extending the veto power to remedies as well would acknowledge the practice of Article 7 FD notifications. It could contribute to reducing the tension between the deregulatory goals of the 2003 framework and the increasing amount of regulation: NRAs are seen to often impose the heavier remedies – a Commission veto could perform a useful check as to whether these heavier remedies are indeed the most appropriate ones.

f. Conclusion

It is clear that the options outlined above are not mutually compatible; rather a choice will have to be made. Option a) does not seem satisfactory; after all the idea is to improve the workings of the current system and other issues discussed supra indicate that there is a real need for modifications. Options b) and e) are in all likelihood too radical, and will not be acceptable for respectively the Commission and the NRAs (or Member States). While option d) is undeniably interesting and has definite advantages, it at the same time is somewhat unrealistic and is not in keeping with the current pace of developments – the ERG only having been in existence for some three years and an ETA being a very contentious issue as it is. Accordingly, we submit that option c) should be pursued. This option is in keeping with the thrust of the discussion in the rest of this paper. More particularly, it recognises – and can help to adjust – the heaviness of the Article 7 procedure – a clear candidate for reform in the 2006 Review. Also, it is in keeping with the original idea of the veto power, namely that this power should not be invoked too easily but

should rather respond to threats to the consistency of EC law and aim to ensure the correct interpretation of EC law.

3. *Options as regards procedure as a whole*

a. Status quo

The Commission and NRAs might feel that the procedure is burdensome, but that is merely because the procedure is new, and all actors have to acquire practical experience. Once the first round of market analyses has been completed, the Commission and NRAs should be able to complete the subsequent analysis in a speedier and more efficient way. Also, while the time limits of Article 7(3) and (4) FD are admittedly stringent, rapid decision-making is essential in a market as dynamic as telecommunications, in order not to stifle innovation and ensure legal certainty for market players. Rather than meddling with the procedure as such, any workload-related problems should be addressed by increasing the resources available to the Commission and NRAs. Finally, if the option outlined under issue C, point 2, under I (the number of markets to be analysed) is accepted (i.e. fewer markets to analyse), there will automatically be a reduction in workload, making any changes to the Article 7 procedure superfluous.

b. Reduce the type and/or number of decisions required

Nonetheless, there are compelling reasons to change the Article 7 FD procedure: the Commission seems rather overburdened with the constant stream of decisions from 25 NRAs analysing a basic set of 18 markets (many of which are further subdivided product-wise or geographically). This is evident from *inter alia* the standardized replies that are sent out to NRAs in respect of those draft measures that are deemed unproblematic in the first phase. Also, there is no reason to expect that the workload will decline, or that the Commission and NRAs are simply faced with a start-up workload that will disappear. The problem would have been even worse if the Member States (legislatures and NRAs) had actually complied with the timeframe originally intended and conducted their market analyses in the second half of 2003. The Commission would then have been overpowered. As it is, only a third of the Member States have completed their market analysis cycle or almost, with another third having yet to begin notifying draft measures, and that two years later than originally foreseen. By the time all Member States have completed their first market analysis cycle, the early ones will begin their second cycle. Under the current circumstances, with the Commission having to deliver decisions under pressure (from time and limited resources), the procedure delivers relatively limited added value to the NRAs.

A constructive solution is thus called for, for instance in reducing the type of decisions that are subject to the Article 7 procedure. This can be achieved in many ways (not exclusive of each other):

(i) *reducing the class of draft NRA measures subject to the consultation procedure of Article 7(3)*. This would imply either narrowing the criterion of affecting trade between Member States (which appears unrealistic given that this is shared with competition law), or reducing the number of decisions falling under Article 7(3)(a) FD. This can be achieved by two – complementary – means. First, by removing national decisions adopted under Article 5 Access Directive from the Article 7 FD procedure. The impact of this modification, however, would be marginal. A more promising solution would seem to

reduce the number of markets to be analysed. This option is discussed above: issue C, point 2 under I (the number of markets to be analysed);

(ii) *reducing the class of draft measures subject to a potential veto under Article 7(4)*, which however is not really practicable. Indeed, Article 7(4)(b) FD means in practice that all draft measures under the SMP procedure are covered, since the NRA must always decide on SMP in the context of that procedure. There is no obvious means of narrowing down Article 7(4)(b) FD without reducing the effectiveness of the Article 7 procedure.

Another possibility would be to look at the reform of EC competition law for inspiration, by restricting the official interventions of the Commission only to those cases where it intends to use its veto power (much like under Article 11 of Regulation 1/2003, the Commission does not act until it actually wants to deprive an NCA of a case pursuant to Article 11(6)). The Commission would therefore refrain from systematically commenting on NRA draft measures, and would only issue comments pursuant to Article 7(4) FD when it intended to move to the second stage of investigation and eventually veto a draft measure. This way, the workload would be reduced. Such a construction is already compatible with the current text of Article 7 FD.

4. *Judicial review*

We will limit ourselves to mentioning two potential obstacles in obtaining judicial review of measures adopted pursuant to Article 7 FD. Firstly, Article 230 EC requires the existence of a challengeable act. While this is unproblematic for veto decisions under Article 7(4) – they are after all formal decisions within the meaning of Article 249 EC – this will pose an obstacle for mere "letters of comment" issued under Article 7. There the Commission only adopts a 'letter' which, it can be argued, does not as such affect anyone's legal position. Even if a Commission measure under Article 7(3) were to be re-qualified as a decision, this would leave unaffected the second hurdle, namely that of locus standi. Here a distinction has to be made between the NRA and third parties. Since the decision is addressed to the NRA, the NRA itself will have standing according to Article 230, fourth indent. The NRA can also ask its Member State to challenge the decision (on its behalf) in which case standing is again not a problem. The locus standi of third parties is however more problematic, as mentioned already. The undertaking to which the NRA decision now vetoed was addressed might perhaps be able to claim standing applying the *TWD* case law[18] per analogy and thereby escape the restrictive ECJ case law on standing. But competitors who have merely been involved in the national procedure giving rise to the Commission decision will see their challenge fail because of the inability to show "direct and individual concern" under Article 230 EC, according to the interpretation of the ECJ. Admittedly, there is always the possibility of an indirect challenge pursuant to Article 234 EC. However, this route is beset with problems. Firstly, it is uncertain as the market party will have to wait for a negative – and challengeable – decision to be adopted by the NRA and then hope that the national court where he challenges this decision will actually decide to send a preliminary reference to the ECJ. Secondly, it follows that this option is also cumbersome and lengthy; two issues which are particularly inappropriate in a market as dynamic as telecommunications.

## B. Functioning of the European Regulators Group (ERG)

[18] Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833.

The ERG, as created in the wake of the new electronic communications regulation, is developing in practice as an important institutional actor, the actions of which have considerable ramifications for NRAs in their decision-making process (the Common Position on Remedies being a case in point). This raises the issue of judicial review: should ERG actions be challengeable before a judicial body, and if so, which body, by whom, on which grounds, and applying what standard of judicial review?

Here the *status quo*, i.e. no judicial review, is a defensible option. Judicial review of ERG actions would basically not be necessary, as those decisions that actually affect individual operators are taken at national level by the NRAs and these are subject to judicial challenge before national courts, as a result of Article 4 FD. Also, ERG actions are informal in nature, i.e. they do not prevent NRAs from adopting divergent positions. From a viewpoint of legal certainty, it would nevertheless be helpful if this position were clarified, since there is no provision in the current regulatory framework on that point.[19]

Yet while the reasoning under a) is perhaps theoretically satisfactory and sustainable, it ignores the practical effect of ERG actions, notably its Common Positions and Principles. It is very likely that these documents will be followed by NRAs in individual cases, for the simple reason that they have been actively involved in the drafting and adoption of these documents; and that the exact purpose of adopting these documents in the first place is to coordinate decision-making.[20] Accordingly, while an undertaking faced with a decision by an NRA can challenge that decision before a national court, its ability to do so will be hampered if the NRA can hide behind an ERG document. The national court cannot truly be expected to engage in an examination of the ERG document upon which the NRA decision is based, so that the practical effect and meaning of the judicial review provided for at Article 4 FD is in the end reduced. Some form of *judicial review* of ERG documents would thus be advisable.

The current wording of Article 230 EC, however, does not seem to permit a challenge to the ECJ, for various reasons: (i) the ERG is not a Community institution within the meaning of Article 230 EC, (ii) its documents are not decisions or otherwise acts which are covered by Article 230 EC and (iii) the current standing rules for individuals under Article 230 EC are so restrictive that challenges are likely to be found inadmissible.[21]

Nevertheless, it would seem that the ECJ/CFI would be better placed than a national court to entertain a challenge to ERG documents, i.e. 'final' documents that have been promulgated as such and are expressly intended for 'external' usage. The ECJ/CFI is used to review economic policy matters and furthermore is best equipped to take the European dimension of the ERG actions into account. Whatever judicial review scheme would ultimately be retained, it ought to be laid down in a formally binding legislative instrument to bring clarity, enhance legal certainty

[19] This approach can be contrasted with the constituent regulations for European agencies, some of which do explicitly provide for the possibility of a judicial challenge before the ECJ.
[20] Compare in this respect also the wording of Article 7(2) which states that in order to ensure the consistent application of the 2003 Framework, NRAs and the Commission shall 'seek to agree on the type of instruments and remedies best suited to address particular types of situations in the market place'.
[21] *Plaumann*, [n2] and *Unión de Pequeños Agricultores* [n2].

and avoid disputes centring on deciding these questions as opposed to dealing with the merits of the respective case.[22]

If for reasons listed above it would prove unpracticable to subject ERG documents to judicial review, an alternative option would be to *open the ERG procedures and make them more transparent.* The model of the NPRM under the US Administrative Procedure Act (APA) could be used by analogy. The ERG would then issue a notice that it intends to deal with a given issue, setting out what the points to be decided are, what its options are and which information it would like to obtain from market parties and other participants in the procedure. The ERG would then build up a file, perhaps conduct hearings, and then reach a conclusion, in which it would address the submissions received. The US procedure can be branded monstrous and unwieldy, if one looks at the amount of paperwork and resources going into it, but it does force the authority to listen to observations and engage them in its decision. In the absence of judicial review, this may be the best safeguard.

## C. The situation and position of national courts

Under the current institutional divide of competences in electronic communications regulation, national courts are regarded as an actor of comparatively little importance. This is reflected in the modest number of legislative provisions concerning them and the complete absence of any informal instruments relating to them (in contrast to the position in EC competition law). Article 4 FD, however, gives national courts the competence to decide on appeals against NRA decisions, and includes some far-reaching and innovative institutional and procedural requirements to make this competence a meaningful one.

Indeed, Article 4 FD was a reaction to case-law where national courts used their competences to annul NRA decisions on primarily formalistic grounds, which was seen as counterproductive.[23] They restrictively interpreted the competences of the NRAs and often found them wanting, leading to the annulment of their decisions.

Still the current electronic communications framework does not at any point attempt to induce national courts to see the EC dimension of regulation. There is thus a risk that the actions of the NRAs, even if suitably in line with the EC consensus, can be unwound by national courts, if the latter's perspective remains confined to their respective Member States. This danger is all the greater, since EC electronic communications law is couched in directives, so that the implementing national law often obscures the EC dimension. Thus, how can it be ensured that national courts behave as good Community actors and do not unnecessarily – and inappropriately – undermine the NRAs' work?

As a starting point, it is important to appreciate why national courts ended up annulling NRA decisions on formal grounds. On the continent, a number of national legal systems do not readily admit that independent authorities be given wide, discretionary powers, usually for reasons of a

[22] Compare also Article 4(1)FD.
[23] The assumption that this practice is undesirable finds support in the wording of Article 4 FD at the moment, where it is expressly provided that Member States must ensure that 'the merits of the case are duly taken into account'. This can be read as expressing the wish to avoid a merely formal analysis of the decision concerned.

constitutional nature, namely the primacy of politics (i.e. the principle that major decisions must be made by, or under the authority of, elected officials). This reluctance was perhaps not always appreciated fully when EC law was elaborated. Of course, such reluctance can be "overriden" by the supremacy of EC law, but this does not address the underlying 'feeling' in many courts that the onset of independent regulatory authorities is something to be weary of and accordingly something that calls for strict control on competence issues.

Article 4 FD admittedly attempted to address that problem by stating that 'Member States shall ensure that the merits of the case are duly taken into account'. Yet, this phraseology ignores the fact that even if a court duly takes the merits into account, that is not the sole determinant of the outcome of the case. Equally, if not more important is the standard of review. Even if a court is competent to inquire into the merits of any particular case, presumably it should only annul the decision under attack in 'extreme cases', i.e. where the decision is blatantly wrong or inappropriate. It might be good to reflect on the wording of Article 4 FD and determine what it is exactly that we wish national courts to do (read: what type of final decisions national courts should end up with).

Currently, national courts can be induced to 'behave as good Community actors' via the threat of infringement proceedings under Article 226 EC. The judgment in *Köbler*[24] has made it clear that this is no longer a merely theoretical option. In substance, Article 10 EC requires national courts to contribute effectively and actively to the achievement of the EC's goals and objectives, which can be interpreted to mean not to unjustifiably hinder NRAs in discharging their EC-based rights and obligations in EC telecoms.

In addition, the EC perspective of national courts can be strengthened by informal measures, such as training courses provided by the Commission, or an exchange programme for judges. In more formal terms, we can look to EC competition law for inspiration, notably Article 15 of Regulation 1/2003. While the *amicus curiae* construction would for obvious reasons be inappropriate, the other two mechanisms mentioned there might be copied into the 2003 Framework. So, national courts could be given the express competence to ask the Commission for information of a factual, legal or economic nature. The express inclusion of such a competence might assist in raising awareness among judges of viewing telecommunications as a sector that has a clear and important European dimension to it. Secondly, if national courts were required to notify their judgments relating to the 2003 Framework to the EC level, the Commission could then, as it has done in EC competition law, compile an electronic database in which national judges can access decisions by their counterparts on the same issues they are grappling with. Again, national courts would thus become aware of the fact that the cases before them are not unique to their respective State, in turn hopefully leading to a greater degree of consistency in judgments across Europe.

## D. A European Telecommunications Agency (ETA)

The creation of an ETA was broached during the 1999 Communications Review. There is a trend evident in EC law whereby in certain areas, agencies are set up at European level that function more or less independently from the Commission and who are primarily responsible for the

[24] Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR II-10239.

regulation of the sector concerned. In 2006, it cannot be excluded that the issue will prop up again for the electronic communications sector. Two interconnected issues arise: should an ETA be created, and if so, what are the implications of the creation of such a body for the role and competences of the Commission and the national authorities in the area?

A first option is the *status quo*, i.e. no ETA. The existing institutional design for EC telecommunications seems to operate in a satisfactory fashion. The advanced cooperation between the Commission and NRAs, as evidenced notably in the workings of the ERG, would make the creation of an ETA redundant. At a policy level, the principle of subsidiarity would seem to make the creation of an EC level actor somewhat inappropriate. Furthermore, the institutional design of EC telecommunications has been subject to numerous alterations and amendments ever since the 1980s and while some measure of experimentation might have been appropriate in the beginning, at a certain point a stable institutional framework should emerge. New alterations so shortly after the entry into force of the 2003 Framework might thus be too hasty, and hence inappropriate. Finally, political difficulties are to be expected: Member States will consider the creation of an ETA as an unwarranted encroachment upon their competences, and also, their efforts in setting up independent NRAs would thus be rendered relatively meaningless. Given political sensitivities, the *status quo* seems more likely to prevail.

Nevertheless, there are some reasons why an ETA could be desirable. In the studies carried out in the 1990s, market parties have expressed a wish for more EC level involvement as regards certain aspects of EC telecommunications. The advantages of an ETA seem plentiful. An ETA would not be faced, or at the very least to a much smaller degree, with such independence and regulatory capture issues which have affected NRAs. As an independent agency, the ETA is also likely to be more committed to achieving the internal market, and will not be swayed so easily by purely competition law considerations, as seems to be the case with the Commission in telecommunications (read: DG COMP influencing DG INFSO). Accordingly, the achievement of the Lisbon objectives in the telecommunications sector could be rendered more feasible. A single body would be easier to dismantle if and when it has become redundant, which would be in keeping with the deregulatory goals underlying the current institutional regime. Furthermore, transaction costs for market parties would be reduced by removing the uncertainty as to which NRA to deal with and the costs of dealing with multiple NRAs. Also, by entrusting the majority of regulatory duties to an ETA, the EC would be more in step with the approach taken in the United States, Australia and Canada.

If the creation of an ETA were considered,[25] some further options arise. The ETA could have limited competences.[26] Its creation could then turn out to be a burden, rather than a blessing. Certainly, transaction costs are more likely to be increased than reduced. It can be expected that market players will be confused as to which actor is responsible and competent. There is a danger of overlapping competences and of more – unnecessary – bureaucracy for the Commission and

[25] A separate issue is of course the legal basis for setting up an ETA. In this respect, it will be interesting to see the ECJ decision in Case C-217/04 *United Kingdom v Council and Parliament* concerning the European Network and Information Security Agency (ENISA), set up pursuant to Article 95 EC. This legal basis is challenged by the United Kingdom, who submits that the correct legal basis is Article 308 EC.

[26] The Draft Final report on the Possible Added Value of a European Regulatory Authority for Telecommunications, September 1999 found that there was support to transfer competences in areas such as licensing and interconnection to a European-level actor.

the NRAs, as they will have to cooperate with yet another actor, which is problematic in light of the concern expressed at the workload created by the cooperation arrangements currently in place.

Accordingly, an ETA with full competences might be preferred. In order to secure all the advantages an ETA could bring, it would be worthwhile considering a – virtually – complete transfer of competences from the NRAs to the ETA, making it the primary actor responsible for EC telecommunications.[27] The current institutional design has too many actors – Commission, ERG, NRAs, NCAs and national courts – amounting to a source of confusion for market players. Replacing these with an ETA results in a transparent institutional design, in accordance with good governance principles.

Finally, the Commission or the ERG could develop into an ETA, meaning that in due time all meaningful competences would be concentrated in the Commission or the ERG. In the former case, this would entail a strengthening of the Commission's controlling powers vis-à-vis the NRAs, perhaps even leading to the Commission gaining express competence to deliver individual decisions under EC telecommunications. The role of the NRAs would thus become very limited indeed.

## Conclusion

No attempt will be made to summarize the entirety of arguments set out above. Rather, we will conclude with listing some general points.

- It is clear that the 2006 Review can be quite substantial in nature, as opposed to a mere 'clean-up' situation;
- Assuming a more substantial review, more than just substantive issues can – and arguably should – be addressed.
- At the very least, the objectives listed in Article 8 FD need to be straightened out;
- On the institutional side we have shown that for a number of issues, e.g. Article 4 and Article 7 FD, the status quo is not adequate and that (substantial) change thus seems impediment;
- When deciding on how to change the existing framework, it would be a good idea to use economics for the institutional matters. This approach can help notably with the incentive problem of the NRAs;
- Lastly, the judicial review problem is pervasive:
    - At times, judicial review is entirely absent – as is the case with for instance ERG actions, the Commission recommendation on relevant markets and Article 7 outcomes – and at times judicial review is surreptitious – as is the case with the Article 7 notification procedure, where the German veto decision is the clearest example;
    - As a general principle, it is submitted that there should a) be only one short at judicial review, as opposed to endless challenges and b) that this shot at judicial review should occur where the "hunch" is in the decision-chain, i.e. where the transition between general policy and (individual) decisions takes place;

[27] The role of the Commission would also be rendered less important, as it no longer needs the control powers it currently possesses vis-à-vis the NRAs.

- Of course, this problem cannot be solved entirely without the realm of sector-specific regulation; some issues, such as the restrictive locus standi under Article 230 EC call for EC law-wide changes.